

1
2 UNITED STATES DISTRICT COURT
3 DISTRICT OF NEVADA

4 ALFRED CHRISTOPHER GONZALES,
5 Petitioner,
6 v.

7 JO GENTRY, *et al.*,
8 Respondents.
9

Case No. 2:18-cv-00266-GMN-PAL

ORDER DISMISSING ACTION,
WITHOUT PREJUDICE, AS MOOT

10
11 In this habeas corpus action, brought *pro se* by Nevada prisoner Alfred
12 Christopher Gonzales, on August 20, 2018, the Court denied the respondents' motion to
13 dismiss, without prejudice, and directed the parties to submit briefing with respect to
14 certain issues. See Order entered August 20, 2018 (ECF No. 16). Specifically, the Court
15 invited briefing regarding the following issues:

- 16 1. As the petition in this action concerns the September 30, 2015, judgment,
17 does the entry of the March 1, 2018, amended judgment render this action
18 moot, and subject to dismissal on that ground?
19 2. As it appears that there has been no state-court litigation relative to the
20 March 1, 2018, amended judgment, would all claims concerning that
amended judgment be unexhausted in state court, such that a federal
habeas action relative to the amended judgment would be premature and
subject to dismissal on that ground?

21 See *id.* The respondents filed their brief, addressing these issues, on October 19, 2018
22 (ECF No. 22). The petitioner did not file a response.

23 In this action, initiated by Gonzales on February 12, 2018, Gonzales challenges a
24 September 30, 2015, judgment of conviction, in Nevada's Fifth Judicial District Court
25 (Nye County), in Case Number CR 8231A in that court, by which he was convicted of
26 battery by a prisoner and sentenced to five to twenty years in prison. See Petition for
27 Writ of Habeas Corpus (ECF No. 1); see *also* Judgment of Conviction, Exh. 19 (ECF
28 No. 8-19). However, Gonzales is no longer in custody on that judgment of conviction.

1 Rather, on March 1, 2018, after Gonzales initiated this action, an amended judgment
2 was filed in his criminal case, Case Number CR 8231A in Nevada's Fifth Judicial District
3 Court. See Amended Judgment of Conviction, Exh. 63 (ECF No. 9-30). Gonzales is now
4 in custody on that amended judgment.

5 Respondents argue – accurately, in the Court's view – that, under *Magwood v.*
6 *Patterson*, 561 U.S. 320 (2010), and Ninth Circuit Court of Appeals precedent, this
7 action is now moot, and subject to dismissal on that ground. See Response to Court
8 Order (ECF No. 22), pp. 4-8; see also *Gonzalez v. Sherman*, 873 F.3d 763 (9th Cir.
9 2017); *Smith v. Williams*, 871 F.3d 684 (9th Cir. 2017); *Wentzell v. Neven*, 674 F.3d
10 1124 (9th Cir. 2012).

11 The Court determines, then, that, as the petition in this action challenges a
12 judgment of conviction that has been superseded, and under which Gonzales is no
13 longer held in custody, this action is moot. The Court will dismiss this action, without
14 prejudice, on that ground.

15 The Court observes that, as the amended judgment of conviction was filed on
16 March 1, 2018, Gonzales will have time to initiate a new federal habeas corpus action,
17 challenging the amended judgment under which he is held in custody, without being
18 barred by the statute of limitations, if he chooses to do so. The dismissal of this action
19 will be without prejudice to Gonzales initiating such a new action. To do so, Gonzales
20 must draft a new habeas petition, using the correct form, and he must send it to this
21 Court for filing, with payment of the filing fee, or a complete application to proceed
22 *in forma pauperis* drafted using the correct form and supported by the necessary
23 attachments. The documents submitted to initiate a new action should not have on them
24 the case number for this case; a new case number would be assigned to the new case.
25 The Court will direct the Clerk of the Court to provide Gonzales with the forms
26 necessary to initiate a new action.


IT IS THEREFORE ORDERED that this action is dismissed as moot, without prejudice to the petitioner initiating a new federal habeas corpus action challenging the amended judgment of conviction under which he is held in state custody.

IT IS FURTHER ORDERED that the petitioner is denied a certificate of appealability.

IT IS FURTHER ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

IT IS FURTHER ORDERED that the Clerk of the Court is directed to send to the petitioner, along with a copy of this order, two copies each of the form for a petition for writ of habeas corpus under 28 U.S.C. § 2254, and the form for an application to proceed *in forma pauperis*, along with any available instructions relative to those forms.

DATED THIS 10 day of December, 2018.


GLORIA M. NAVARRO,
CHIEF UNITED STATES DISTRICT JUDGE